

MADRAS RECORD OFFICE.

Government of Madras.

Financial DEPARTMENT.

G.O. No. <i>505</i>	Press ~~Mis.~~
Dated <i>10 9</i>	<i>1859</i>

B. no. 1-2

5/6

Not to be folded or roughly handled

20/8/27

*Proceedings of the Madras Government, Financial Department,
from 10th to 16th September 1859.*

No. 1. Read the following letter from J. R. BOYSON, Esq., Government Solicitor, Madras; to the Chief Secretary to Government, Fort Saint George, dated 5th September 1859, No. 1520.

1. I have the honor to acknowledge the Extract from the Proceedings of Government, dated 27th August 1859, No. 485, Financial Department.
2. I submitted same for the consideration of the Advocate General and.
3. I now forward a copy of his opinion.

Copy Opinion.

I observe that this appeal must have *succeeded*, had not Sir R. Bethell, apparently under instructions from Government, *abandoned* the objection in point of *form*, see paragraphs 25 to 28 inclusive of my opinion of 30th December 1857, on which I had so much relied and which I am sure the Court of Directors would never have abandoned:—and most justly, for it is really upon a technical point, after all, that the Plaintiff has succeeded: namely that the Court of Directors had notice *in law* of the illegal and irregular introduction by the Trustees in 1838, (in their untruly styled “reprint of the rules”) of the important new line-and-a-half which never existed in the old rules of which this Pamphlet was said to be a mere reprint; and which then, for the first time possessed to authorize a refund and which addition was never proposed to any meeting of the Civil Service, never sanctioned by their votes, never reported to the Court of Directors or sanctioned by them though clearly the Honorable Court never had notice *in fact* till 1850; whereupon they immediately, in 1851 and on several subsequent occasions, expressed their strong disapprobation of it. This point, namely the precise time when the Honorable Court had actual notice *in fact* of these refunds, I had never been able clearly to ascertain here—but in pages 88 and 89 of the short hand writers report, I think Sir R. Bethell has demonstrated that it was not till after the 8th May 1850, that the Court could have had any such notice in fact. The Privy Council however seem to have held that notice *in law* had been given by the forwarding of the Pamphlet, *misdescribed* as a reprint (and which in consequence of this misdescription, was never examined) and by the forwarding of certain accounts in 1841 to the Government of Madras in which a few small *refunds* were again *untruly described* as having been repaid as “being the over payment of *finer*”—whereas in truth they were nothing of the sort, and which entries in consequence of this second misdescription, also seem to have passed unnoticed. It was however admitted that these two vitally important misdescriptions, powerfully animadverted on by Sir R. Bethell, which clearly kept the Honorable Court in actual ignorance of what was going on about these refunds, did not proceed from any *intentional bad faith*; and, therefore, and as notice to the Madras Government was notice *in law* to the Honorable Court (for it seems *still doubtful* whether, in fact, the Honorable Court ever received the Pamphlet of 1838, or the accounts of 1841 before the year 1850) the Privy Council seems to have held that the Honorable Court *had notice*; and, by their not objecting till 1850, that they must be taken to have consented, and that all their subsequent acts must be construed to be those of persons acting with full knowledge of facts—which in reality they did not know till 1850-51. Thus as Mr. Robertson's success was obtained on so technical a point, and in direct opposition to the clear *intentions* of the Honorable Court, that Court would have been clearly justified, not only in law, but in equity and honor in relying upon the technical objection to the form of Sir C. Rawlinson's Decree. That Decree ordered Mr. Robertson's annuity and refund to be paid him by the *East India Company*, whereas his own Bill prayed that *the Civil Fund and Trustees* should be decreed to pay them and admitted that the Honorable Court's contract and liability was only with and to the Civil Fund, not to Mr. Robertson individually. This point was favorably noticed more than once by the Lords Justices Turner and Knight Bruce, as well as by Sir R. Bethell—see pages 97, 150, 163 and 181 of the report; till in page 181, Sir R. Bethell on behalf of Government agreed to waive the objection. How fatal that objection must have been if not abandoned, appears, abundantly from the high state of delight and thankfulness into which Mr. Roundell Palmers, Mr. Robertson's counsel, was thrown by Sir R. Bethell's agreeing to waive it. Now the Home

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Government had an undoubted right to throw away their own costs if they pleased, but hardly so those of the Civil Fund and its Trustees, I am not in a position at present to say what amount of costs the Trustees have lost by the course taken by Sir Bethell, but whatever it is, I presume the Home Government will repay them on due application being made.

2. The Privy Council I see moreover have distinctly upheld two of the principal points, in addition to the point of form on which I relied when advising the appeal see Paragraphs 15 to 22, inclusive, 30th December 1857, viz., 1st that the original contract of 1825, did *not bind* the East India Company to make the refunds contended for; and 2ndly, that the Company were *not bound* by the alteration of the Rules in 1838; but they were of opinion that the Company "are precluded by *their conduct* from disputing the right" of Mr. Robertson, to the refund he claimed—a reference to my opinion paragraphs 23 and 24, will shew that this is the very point upon which I apprehended that the Court of Directors, by their course of dealing and *particularly* by their indiscreet and incautiously worded *letters*, (written, I am satisfied, in actual ignorance of the real state of facts,) had laid themselves open to an adverse decision.

3. Sir R. Bethell's argument and reply were most masterly, showing wonderful power and ability, and though over ruled, I cannot find that he has been answered even by the Court, certainly not by Mr. Roundell Palmer.

The Decree, however, is of course conclusive as to the legal rights of Mr. Robertson, Mr. Daniell Elliot and all others in the same position. Mr. Robertson must have his Rs. 47,467-0-6 and Mr. D. Elliott his Rupees 1,36,731-10-7.

5. The only remaining question is who are the others in the same position.

6. Now it is to be observed that three of the main points on which the Privy Council relied in Mr. Robertson's favor, are, 1stly that he had always asserted his right to a refund; 2ndly that he had *claimed* his annuity, with a refund, on the 17th November 1852, *before* the Rule abrogating refunds was passed; and 3rdly that when he accepted the annuity in 1854, he did so under protest, and with reservation of his rights to a refund. Wherever therefore these elements are wanting, the present decision will be no authority in favour of any future claim to a refund. A fortiori, no subscriber who had notice of the meeting of the 17th June 1853, and who either assented to, or did not protest against its proceedings, can maintain any such claim.

7. The letter of the Secretary, Mr. W. Hudleston, gives me no information on this point, but I believe that of the Six Members now in the service named in the appendix, at least two attended that meeting and that one of them voted with the majority, and the other did not vote at all.

8. As regards the three Retired members, I have no information as regards Mr. J. A. Hudleston's or Sir H. C. Montgomery's proceedings as affecting their claim to a refund; but Sir V. Stonhouse's minute, referred to by Sir R. Bethell in his argument, shows (what I know of my own personal knowledge,) that Sir V. Stonhouse's only reason for not claiming the refund was his conscientious belief and conviction that the Honorable Court never *intended* to grant any refund, that the proceedings, and surreptitiously introduced Rule of 1838, were irregular, and that no just claim to a refund could be founded upon them, and that he believed the Honorable Court never to have had clear information of the practice of refunds before 1850, and that, therefore, their letters could not fairly be taken as authorizing a practice of which they had no knowledge. This being so it does seem to me that Sir V. Stonhouse has a very strong moral and equitable claim to a refund of the Rupees 47,378-3-6 to which he would *now* have had a *legal title* but for his own highly honorable and conscientious scruples.

(Signed) THOMAS SYDNEY SMYTH,
Advocate General.

(True Copy.)

(Signed) J. R. BOYSON,
Government Solicitor.

September 3rd 1859.

*Proceedings of the Madras Government, Financial Department,
from 10th to 16th September 1859.*

No. 2. ORDER THEREON, 10th September 1859, No. 505.

Resolved that a copy of the Advocate General's opinion enclosed in the above letter be furnished to the Trustees of the Civil Fund in reference to their Secretary's letter of the 25th ultimo, No. 231.

2. It is observed that in the concluding paragraph of his opinion, Mr. Smyth has made some remarks upon Sir V. Stonhouse's title to refund. He has not, however, yet specially reported on Sir V. Stonhouse's application submitted to Government by Mr. Hudleston in his letter of the 3rd instant, and referred by them for the Advocate General's opinion under date the 5th idem.

(Signed) T. PYCROFT,
Chief Secretary.

Exd. A. P. W. Begbie.

Financial Department

Proceedings of the Madras Government

Read the following letter
from the Government Solicitor-

(Here enter 5th September 1859)
7th 1820

Order thereon 10th September 1859 N^o 505.

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under date the 5th idem.

Initials J.P.

To the Trustees Civil Fund. disp^d 10th m^o.

L. 40

10th March

Dr. Peter Henry 21: 15 Oct 1839.

From of 1839 16 1/2

Financial 1839 16 1/2

Refd to 29th March 1839 16 1/2

1839 16 1/2

Transferred to the
Govt. of Sandwich 1839 16 1/2

Proceedings of Government

Quoted 10 September 1839.